VIEW OF ADVOCATE GENERAL JÄÄSKINEN delivered on 22 September 2010 [1]

I — Introduction

1. By this reference for a preliminary ruling, the Court is asked to rule on the interpretation of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2] (also known as 'Brussels II bis').

2. The reference has been made in appeal proceedings brought before the Supreme Court (Ireland) by Mr McB., the father of three children, [3] against the judgment of the High Court (Ireland) of 28 April 2010, on the ground that the latter court had dismissed his application seeking a decision or determination declaring the removal of the children to the United Kingdom in July 2009 by Ms E., their mother, to be wrongful within the meaning of Article 2(11) of Regulation No 2201/2003 and declaring that the father of the children had rights of custody on the date of that removal. Mr McB. is not, and has never been, married to Ms E. There is no court judgment giving him rights of custody within the meaning of Regulation No 2201/2003 in respect of children of both parties.

3. That issue was brought before the Irish courts because the English court where the father brought proceedings in order to obtain the return of the children (the High Court of Justice of England and Wales, Family Division, United Kingdom) requested, in accordance with Article 15 of the Hague Convention of 25 October 1980 on the civil aspects of international child abduction, [4] that he produce a decision issued by the authorities of the State of the children's habitual residence, namely Ireland, declaring that the removal was wrongful.

4. Under Irish law, the natural father of children does not by operation of law have rights of custody, but he can obtain such rights by means of a court judgment. The fact that unmarried parents may have cohabited and that the father may have played an active part in bringing up the child, as in the present case, does not give him such rights. The purpose of the question referred for a preliminary

1 — Original language: French

2 — OJ 2003 L 338, p. 1.

3 — Mr McB.'s legal representative stated at the hearing that he is registered as the father on the birth certificate of the first child, but not on those of the other two children of Mr McB. and Ms E. However, I believe that the paternity of the three children is not disputed by the parties.

4 — 'The 1980 Hague Convention'.

ruling is to ascertain whether Regulation No 2201/2003, if interpreted in accordance with Article 7 of the Charter of Fundamental Rights of the European Union, [5] precludes Ireland from providing by its law whereby the rights of custody of a natural father are dependent on such a judgment.

II — Legal context

A — *The European Convention for the Protection of Human Rights and Fundamental Freedoms*

5. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [6] ('the ECHR') provides:

'Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

B — *The 1980 Hague Convention*

6. Article 1 of the 1980 Hague Convention provides:

'The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'

5 — Proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), adapted and given binding legal force upon the adoption of the Treaty of Lisbon (OJ 2007 C 303, p. 1), 'the Charter'.

6 — Signed at Rome on 4 November 1950.

7. Article 3 of the 1980 Hague Convention provides:

'The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

8. Article 4 of the 1980 Hague Convention states:

'The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.'

9. Under Article 5 of the 1980 Hague Convention:

'For the purposes of this Convention:

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.'

10. Chapter III of that convention concerns the return of children and Article 8(1) provides:

'Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.'

11. Article 15 of that convention provides:

'The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.'

C — *The Treaties*

12. Article 6 TEU provides:

'1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

…

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

13. Article 4 TFEU states:

'1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

…

(j) area of freedom, security and justice.'

14. Article 81 TFEU provides:

'1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

…

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

…

(e) effective access to justice.'

15. Article 1 of the Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom states:

'1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom, except in so far as Poland or the United Kingdom has provided for such rights in its national law.'

D — *The Charter of Fundamental Rights of the European Union*

16. Article 7 of the Charter provides:

'Everyone has the right to respect for his or her private and family life, home and communications.'

17. Article 24(3) of the Charter provides:

'Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'

18. Title VII of the Charter contains general provisions governing the interpretation and application of the Charter. Article 51, headed 'Field of application', provides:

'1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.'

E — *Regulation No 2201/2003*

19. Recital 5 in the preamble to Regulation No 2201/2003 is worded as follows:

'In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.'

20. Recital 17 in the preamble to that regulation states:

'In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the

Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.'

21. Recital 30 in the preamble to Regulation No 2201/2003 states that Ireland and the United Kingdom of Great Britain and Northern Ireland gave notice of their wish to take part in the adoption and application of that regulation.

22. Recital 33 in the preamble to Regulation No 2201/2003 reads as follows:

'This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union.'

23. Article 1 of Regulation No 2201/2003 provides:

'1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

…

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;

…'

24. Article 2(7), (9) and (11) of Regulation No 2201/2003 contain the following definitions:

'For the purposes of this Regulation:

…

(7) the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;

…

(9) the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

…

(11) the term "wrongful removal or retention" shall mean a child's removal or retention where:

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention

and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.'

25. Article 10 of Regulation No 2201/2003, headed 'Jurisdiction in cases of child abduction', provides:

'In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time-limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.'

26. Article 11 of that regulation, headed the 'Return of the child', provides:

'1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of [the 1980

Hague Convention], in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

…

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

…'

27. Articles 60 and 62 of Regulation No 2201/2003 provide:

'Article 60

Relations with certain multilateral conventions

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

…

(e) [the 1980 Hague Convention] on the Civil Aspects of International Child Abduction.

…

Article 62

Scope of effects

1. The agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation.

2. The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.'

F — *National law*

28. Under Section 6A of the Guardianship of Infants Act 1964,[7] 'where the father and mother have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant'. Further, Section 11(4) of the 1964 Act[8] provides:

'In the case of an infant whose father and mother have not married each other, the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the father who is not a guardian of the infant, and for this purpose references in this section to the father or parent of an infant shall be construed as including him.'

29. Section 15(1) of the Child Abduction and Enforcement of Custody Orders Act 1991 ('the 1991 Act')[9] provides that a court with jurisdiction may declare that the removal of children from Ireland constitutes, in the case of a removal or retention in a Member State, a removal or a retention which is wrongful within the meaning of Article 2 of Regulation No 2201/2003, or is wrongful within the meaning of Article 3 of the 1980 Hague Convention.

III — The facts in the main proceedings and the question referred for a preliminary ruling

30. The mother of the children whose custody is disputed is of British nationality. The father is of Irish nationality. They have never been married, but have lived together in England, Australia, Northern Ireland and, from November 2008, Ireland. The main details of the factual and procedural background of the dispute can be summarised in tabular form.

7 — As inserted by Section 12 of the Status of Children Act 1987.
8 — As amended by Section 13 of the 1987 Act.
9 — Child Abduction and Enforcement of Custody Orders Act, No 6/1991.

Date	Ireland	United Kingdom
2000		Birth of first child (England).
2002		Birth of second child (England).
2007		Birth of third child (Northern Ireland).
November 2008	The parties took up residence in Ireland.	
11 July 2009	The mother took the children to a women's refuge.	
25 July 2009		The mother took the children to the United Kingdom.
2 November 2009		The father lodged before the High Court of Justice of England and Wales (Family Division) an application initiating proceedings whereby he asked that court to order the return of the children to Ireland, in accordance with the United Kingdom legislation implementing the 1980 Hague Convention and Regulation No 2201/2003.
20 November 2009		The English court requested that the father, in accordance with Article 15 of the 1980 Hague Convention, obtain from the High Court (Ireland) a decision or a determination declaring that the removal of the children from Ireland was wrongful within the meaning of Article 3 of that convention.

Date	Ireland	United Kingdom
22 December 2009	The father commenced, before the High Court (Ireland), proceedings to obtain a declaration, in accordance with the Irish legislation implementing the 1980 Hague Convention and Article 15 of that convention, that the removal of the children from Ireland in July 2009 was wrongful, within the meaning both of Article 3 of that convention and of Article 2 of Regulation No 2201/2003. By the same action, the father asked the High Court (Ireland) to award guardianship and custody of the children to him. The latter two issues have not yet been determined by the Irish courts.	
28 April 2010	The High Court (Ireland) decided that the applicant in the main proceedings had no rights of custody in respect of the children at the time of their removal from Ireland and consequently that removal was not wrongful, within the meaning of either that convention or that regulation.	
	The father brought an appeal against that judgment before the Supreme Court.	
30 July 2010	The Supreme Court referred a question to the Court of Justice for a preliminary ruling.	

31. In its order for referenc e, the Supreme Court observes that the father had no rights of custody in respect of his children on 25 July 2009, within the meaning of the provisions of the 1980 Hague Convention. However, the Supreme Court states that the concept of 'rights of custody' is now defined, for the purposes of applications for the return of children from one Member State to another on the basis of that convention, in Article 2(9) of Regulation No 2201/2003.

32. The referring court considers that neither the provisions of Regulation No 2201/2003 nor Article 7 of the Charter mean that the natural father of a child must necessarily be deemed to have rights of custody in respect of that child, for the purposes of determining whether or not the removal of a child is wrongful, in the absence of a court judgment awarding such rights to him. However, the court states that the interpretation of those provisions of European Union law is within the jurisdiction of the Court of Justice.

33. The Supreme Court decided to stay the proceedings and to refer the following question for a preliminary ruling:

'Does [Regulation No 2201/2003], whether interpreted pursuant to Article 7 of [the Charter] or otherwise, preclude a Member State from requiring by its law that the father of a child who is not married to the mother shall have obtained an order of a court of competent jurisdiction granting him custody in order to qualify as having "custody rights" which render the removal of that child from its country of habitual residence wrongful for the purposes of Article 2(11) of that Regulation?'

IV — View

A — *Admissibility*

34. The European Commission has pleaded that the question referred for a preliminary ruling may be inadmissible. The Federal Republic of Germany has also claimed that the Court has no jurisdiction to answer the question referred for a preliminary ruling. According to the German Government, what is sought is in fact an interpretation of the 1980 Hague Convention and not an interpretation of Regulation No 2201/2003. The issues raised therefore concern the relationship of the convention and that regulation.

35. The Commission notes that the proceedings before the Irish courts, under Section 15 of the 1991 Act, have been brought in accordance with Article 15 of the 1980 Hague Convention, in order to obtain a declaration that the removal from Ireland of the children of the applicant in the main proceedings was wrongful within the meaning of Article 3 of that convention and Article 2 of Regulation No 2201/2003.

36. The Commission is uncertain whether the question referred for a preliminary ruling does in fact concern the interpretation of Article 2(11) of Regulation No 2201/2003 or rather the interpretation of Articles 1 and 3 of the 1980 Hague Convention. If it were the latter, the Court would not have jurisdiction to answer the question referred to it because the European Union is not a party to that convention, although all the Member States are contracting parties.

37. According to the Commission, the fact that, at the time when proceedings were brought before the Irish courts, Regulation No 2201/2003 was not yet applicable favours a restrictive interpretation.

38. It must first be noted that the substantive dispute before the Supreme Court expressly concerns the application of Regulation No 2201/2003 and the Charter, and not the application of the 1980 Hague Convention. The fact that the proceedings pending in the United Kingdom concern the applicability of that convention does not change that. Accordingly, the question referred is one relating to European Union law which is neither hypothetical nor without relevance for the referring court.

39. Secondly, the 1980 Hague Convention is not, as such, part of the legal order of the European Union and the Court therefore has no jurisdiction to interpret it. [10]

40. However, under the provisions of the Treaty, the European Union has the power to adopt measures on matters relating to jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility. [11] In particular, Article 1 of Regulation No 2201/2003 provides that that regulation applies, whatever the nature of the court or tribunal, in civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility, reproducing therefore the scope of the 1980 Hague Convention. Only by the conjunction of Articles 60 and 62 of Regulation No 2201/2003 has the legislature reaffirmed the effects of that convention by declaring that it is, in relations between the Member States, applicable in relation to matters not governed by that regulation. Regulation No 2201/2003 takes precedence over the 1980 Hague Convention where that convention concerns matters governed by the regulation, but the 1980 Hague Convention continues to have effect in relation to matters not governed by the

10 — The Member States are contracting parties to this convention, but the European Union is not. For a recent summary of the case-law, see Case C-533/08 *TNT Express Nederland* [2010] ECR I-4107, paragraphs 58 to 61.

11 — The legal basis of Regulation No 2201/2003 is stated to be Article 61(c) EC [which refers to Article 65 EC] and Article 67(1) EC; after the entry into force of the Treaty of Lisbon, see Article 81 TFEU.

regulation. [12] The legislature has therefore chosen to refer to the provisions of an existing instrument of public international law rather than adopt provisions of European Union law concerning the same matters.

41. The need to include in the draft of Regulation No 2201/2003 provisions dealing with the same matters as the 1980 Hague Convention was controversial at the time. [13] Regulation No 2201/2003, as adopted, covers a plethora of situations concerning jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility. According to the regulation, in cases of wrongful removal or retention of a child, the 1980 Hague Convention 'would continue to apply as complemented by the provisions of this Regulation, in particular Article 11.' [14]

42. Even though Article 11 of Regulation No 2201/2003 appears to make the applicability of that regulation dependent on a finding that the 1980 Hague Convention is applicable, it remains the case that, as regards removals from one Member State to another, the 1980 Hague Convention and Regulation No 2201/2003 are inextricably linked as far as their application is concerned.

43. Furthermore, where a similar definition is used both in the 1980 Hague Convention and in Regulation No 2201/2003, the view can be taken that such a formulation has been 'communitarised' and the Court can interpret it. [15] That applies, for example, to the question of whether a removal or retention is or is not wrongful, a matter defined in Article 3 of the 1980 Hague Convention and in Article 2(11) of Regulation No 2201/2003. However, it must be observed that there are some differences between that regulation and that convention. [16]

44. Since the reference for a preliminary ruling does concern the interpretation of European Union law, I propose therefore that the Court should hold the question to be admissible.

12 — See Articles 60 and 62 of Regulation No 2201/2003.

13 — See, in particular, McEleavy, P., 'The New Child Abduction Regime of the European Union: Symbiotic Relationship or Forced Partnership?', *Journal of Private International Law,* April 2005, p. 5.

14 — See recital 17 in the preamble to Regulation No 2201/2003.

15 — See Borrás, A., 'Protection of Minors and Child Abduction under the Hague Conventions and the Brussels II bis Regulation', *Japanese and European Private International Law in Comparative perspective,* edited by Basedow, J., et al., Mohr Siebeck, Tübingen, 2008, p. 345.

16 — For example, as regards the three ways in which rights of custody can be attributed, in the convention they are preceded by the expression 'in particular', which suggests that the list which follows is merely for illustration, whereas in the wording of the regulation the same list appears to be exhaustive.

B — *Substance*

that the removal of the children from Ireland and their retention in the United Kingdom were not wrongful within the meaning of Article 2(11) of Regulation No 2201/2003.

1. Interpretation of Article 2(11)(a) of Regulation No 2201/2003

45. I note that Article 2(11)(a) of the regulation provides that the expression 'wrongful removal or retention' means the removal or the retention of a child where 'it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect *under the law of the Member State where the child was habitually resident* immediately before the removal or retention'. The expression 'rights of custody', in accordance with Article 2(9) of the regulation, covers 'rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence'.

46. Like the Supreme Court and the Commission, I consider that the wording of those two provisions leaves no room for doubt or ambiguity as to their interpretation: it is clearly for the law of the Member State where the child was habitually resident before his or her removal or retention to determine whether that removal or retention is lawful or not. Since the Supreme Court has clearly stated that the father was not a person vested with rights of custody under Irish law and that he could not rely on provisions whereby he could oppose the removal of the children, it follows

47. The clear distinction made between the father having rights of custody almost automatically, if he is married, and having no such rights, if he is not, appears to be quite widespread in the Member States.

48. In that regard, it is helpful to refer to a recent report which reviews the attribution of 'parental responsibility' in a number of States which are members of the Council of Europe.[17] Since this report examines the question of 'parental responsibility', it should be noted that this is not necessarily the same thing as 'rights of custody' under Regulation No 2201/2003. In any event, Professor Lowe finds that the 'Member States surveyed take a common position on attributing joint parental responsibility to parents of children born in wedlock and on attributing parental responsibility to mothers of children born

17 — See the report of Professor Lowe, N., 'A study into the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation', Council of Europe, Strasbourg, 25 September 2009, CJ-FA(2008) 5, p. 32. The report covers some 30 countries, that is, almost all the Member States of the European Union and a certain number of other countries which are members of the Council of Europe.

out of wedlock'. This conforms to the recommendations to that effect made in a number of international instruments.

49. For the children of unmarried couples, the situation is different, and quite diverse. In 11 countries, once paternity is established, by acknowledgment or court order, both parents have joint parental responsibility. However, in 11 other countries, that is not sufficient. The father must take other measures to acquire parental responsibility (for example, marrying the mother, entering into an agreement with her or obtaining a court order). That variation in approach is reflected in the variation in international instruments on this issue. [18]

50. Consequently, Irish law, which appears close to the second group mentioned above, does not appear to be in any way exceptional.

51. To conclude, Regulation No 2201/2003 does not set conditions for the attribution of rights of custody, although it lists court judgment, attribution by operation of law or by an agreement having legal effect as the three forms of attribution, while omitting the expression 'in particular' which is used in the 1980 Hague Convention, [19] which suggests that, here, the list is exhaustive. The regulation does not establish which parent should have rights of custody. Nor is that matter governed by the 1980 Hague Convention. It is a matter to be determined by national law.

52. Lastly, Article 2(11) of Regulation No 2201/2003 also contains a rule on conflict of laws. It determines the law applicable to the definition of rights of custody in the context of wrongful abduction of children. Of the various possibilities, the choice made by the regulation falls on the 'law of the Member State where the child was habitually resident immediately before the removal or retention'. In that regard, and for the purposes of the applicability of Regulation No 2201/2003, any other rights of custody which may be acquired in a country other than that where the family had previously resided appear to be irrelevant.

18 — Professor Lowe raises the question in his report, op. cit., whether there should be a harmonisation of the approach towards married or unmarried couples in the future, but currently there has been no such harmonisation.

19 — For the 1980 Hague Convention, the precise use of the expression 'in particular' appears to have a degree of importance: 'Likewise, the sources from which the custody rights which it is sought to protect derive are all those upon which a claim can be based within the context of the legal system concerned. In this regard, paragraph 2 of Article 3 takes into consideration some – no doubt the most important – of those sources, while emphasising that the list is not exhaustive … Now, as we shall see in the following paragraphs, these sources cover a vast juridical area; and the fact that they are not exhaustively set out must be understood as favouring a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.' See Explanatory Report by Pérez-Vera, E., Acts and Documents of the Fourteenth Session (1980), the Hague Conference on Private International Law, tome III, p. 446, paragraph 67 (the explanatory report can be accessed at: http://hcch.e-vision.nl/upload/expl28.pdf).

2. Does the natural father have inchoate rights of custody under European Union law?

53. The father's main argument appears to be the following: notwithstanding Irish law, he should be deemed to have inchoate rights of custody, rights which are capable of being recognised. [20] Those rights should be recognised under European Union law as possessed by a natural father who has cohabited with the mother and who has thereby agreed to share the responsibilities of family life in the same way as a married father. Such rights would be based on Article 8 of the ECHR and on Article 7 and Article 24(3) of the Charter. In support of this argument, he refers in particular to a number of judgments of the European Court of Human Rights.

54. As regards the Charter, two essential aspects must be borne in mind. True, the Charter has the same legal value as the Treaties, but the provisions of the Charter do not in any way extend the competences of the European Union as defined in the Treaties. [21] If the Treaty does not give to the European Union the competence to adopt measures on the substantive conditions for rights of custody, the Charter also does not do so. [22]

55. Where appropriate, the compatibility with the ECHR of conditions governing the grant of rights of custody to the father may be subject to review. In that regard three comments must be made.

56. First, while the Court of Justice of course ensures respect for fundamental rights, including those guaranteed by the ECHR, [23] it performs this function within the scope of European Union law. As matters stand, however, the European Union has no competence to legislate on the matter of attributing rights of custody. The competences of the European Union, manifold as they are, do not cover the matters of substantive law at issue here, namely which person must have rights of custody. [24]

57. Given that the substantive conditions for the attribution of rights of custody are not at all governed by European Union law, it follows that there is no link between European Union law and the ECHR in the present case.

58. However, if the conditions governing the attribution of rights of custody under the law of a Member State were to be contrary to the ECHR, it appears to me not inconceivable that this might have consequences as regards the application of Regulation No 2201/2003.

20 — [This footnote concerns the translation of 'inchoate rights' and is not material to the English version.]

21 — See Article 6(1) TEU.

22 — See Article 51(1) of the Charter.

23 — See Article 6(3) TEU.

24 — I note moreover that the Treaty now provides for the accession of the European Union to the ECHR, in Article 6(2) TEU. Article 6(2) emphasises, as does Article 6(1), that such an accession is not to affect the competences of the European Union as defined in the Treaties.

In particular, the obligation on another Member State to recognise judgments concerning the attribution of rights of custody would, where necessary, have to be examined by the Court.

59. For the sake of completeness, I would also like to examine some aspects of the case-law of the European Court of Human Rights referred to by the father, Mr McB.

60. The case-law cited by Mr McB. appears to relate to the attribution of rights of custody and the restrictions imposed thereon by national law, particularly as they relate to unmarried fathers. Accordingly, in *Zaunegger v. Germany*, the European Court of Human Rights held that the Federal Republic of Germany was in breach of the ECHR. The European Court of Human Rights held that the very restrictive conditions, under German law, governing the attribution of rights of custody to the unmarried father, giving an absolute right of veto to the mother, were not compatible with the ECHR. [25]

61. It appears to me that the facts of *Guichard v. France* are very close to those of the case now before us. [26]

62. In that case, the father brought an application claiming a breach of the ECHR before the European Court of Human Rights. In its judgment, the European Court of Human Rights states that it is apparent from the provisions of the 1980 Hague Convention that the central authorities must take all appropriate measures to ensure the immediate return of children who have been wrongfully removed. That convention provides in that regard that a removal must be deemed to be 'wrongful' when it is in breach of 'rights of custody', which includes rights relating to the care of the person of the child, and in particular the right to determine the child's place of residence. The 1980 Hague Convention states, inter alia, in Article 3 thereof, that rights of custody may arise in particular by operation of law. That applied to the case concerned since, on the date of the child's removal from France to Canada, the provisions of French law conferred by operation of law on the mother the exercise of parental responsibility (which entails rights of custody), though the father and the mother had both acknowledged their natural child. In those circumstances, the removal could not be held to be 'wrongful' within the meaning of the 1980 Hague Convention. Consequently, the applicant, who was not a person with 'rights

25 — *Zaunegger v. Germany*, of 3 December 2009 (application No 22028/04). On that basis, the German Constitutional Court (BVerfG) recently ruled that the German legislation on this matter is contrary to the German Constitution (judgment of 21 July 2010, 1 BvR 420/09).

26 — *Guichard v. France* ECHR 2003-X 714, 2 September 2003 (application No 56838/00).

of custody' within the meaning of the 1980 Hague Convention, could not rely on the protection given by that convention.

63. In the light of the foregoing, the European Court of Human Rights held that, in the case before it, Article 8 of the ECHR, interpreted in the light of the 1980 Hague Convention, did not impose positive obligations on the French authorities to secure the return of the child. The case was however held to be inadmissible because the father had not exhausted all domestic remedies before making an application to the European Court of Human Rights.

64. The common element in all the abovementioned cases is that an application for authority to exercise the powers stemming from the possession of rights of custody had been dismissed by the national authorities.

65. However, in the case which is before us, at the time of the removal, the father had not even brought an application for the award of rights of custody, even though there is provision for that possibility in the national legislation. I note also that the mother could not prevent such rights being awarded to the father if the national court with jurisdiction so ruled.

66. Given that there is no national decision refusing rights of custody to Mr McB., any question of there being a possible breach of the ECHR does not even arise.

67. Permit me to add, however, that the conditions governing the award of rights of custody do not appear to me to be incompatible with the rights guaranteed by the ECHR. The case-law of the European Court of Human Rights in no way supports Mr McB.'s assertion that it would be contrary to the ECHR to hold that a natural father does not by operation of law have rights relating to parental responsibility, even in cases of cohabitation, but must rely on the attribution of such rights by a court judgment (or, where appropriate, by means of an agreement). The ECHR does not bestow any rights of custody on the father. He merely has the right to seek to have such rights conferred on him, on an equal footing with the mother, to the extent that that is compatible with the interests of the child.

68. As regards more specifically the protection of family life, relied on by the father and referred to in Article 7 of the Charter, that aspect has been examined by the European Court of Human Rights in relation to its vertical effect, namely in the context [27] of interference by the authorities affecting that

27 — I would point out that Mr McB.'s name does not appear on the birth certificates of two of the three children concerned.

protection within a family.[28] The context of the father's reliance here on that protection is utterly different: the issue is the horizontal effect on relationships between family members, not relationships with the Irish authorities, to whom he has made no application, either to obtain the protection of his fundamental right to family life in accordance with the procedures laid down in the relevant legislation or to obtain the award of rights of custody. In fact, Mr McB. asks the Court to provide an interpretation to the effect that he can obtain from the ECHR inchoate rights of custody, unknown to the law of the Member State concerned, which can be enforced, *ex post*, against the mother and which therefore restrict, *ex post*, her rights of custody, recognised by the law of the State concerned. That is not possible. The interpretation which the father, Mr McB., seeks would amount to a direct application of the ECHR against an individual.

69. To admit that the natural father has inchoate rights of custody, *ex post*, would moreover raise several difficulties. First, that interpretation might hinder freedom of movement for persons, which, under the Treaty, is also of relevance to the mother. The mother could no longer freely decide the child's place of residence and, consequently, her own place of residence. Further, the person concerned, namely the mother, would not be able to have an accurate understanding of her own legal position.

70. Lastly, were the possession of such inchoate rights of custody to stem solely from biological paternity, even against a background of *de facto* cohabitation, without any clear and verifiable legal basis such as a certificate of marital status or an administrative or judicial document relating to the possession of rights which can legally be classified as rights of custody (acquired by operation of law or pursuant to a court judgment or an agreement having legal effect concerning rights of custody), that position would also not be compatible with the requirement of clarity needed to secure legal certainty and to ensure that Regulation No 2201/2003 is properly applied by the judicial and administrative authorities of the Member States. In my opinion, to insist on such clarity in relation to the legal relationships between parents and children is entirely compatible with the fundamental right of the child to maintain on a regular basis a personal relationship and direct contact with both his or her parents, as laid down in Article 24(3) of the Charter, and, in turn, referred to in recital 33 in the preamble to Regulation No 2201/2003.

71. To return to the actual purpose of the reference for a preliminary ruling, I conclude with the reminder that, as regards European Union law, there is no question here of determining whether the father should have rights of custody or not, nor of determining the conditions under which rights of custody can be attributed and by what means. The purpose of these proceedings before the Court is to interpret the conditions which must be met if Regulation No 2201/2003 is to apply in cases of alleged abduction of children.

28 — See Article 7(2) ECHR and, for example, *A.W. Khan v. United Kingdom*, 12 January 2010 (application No 47486/06).

V — Conclusion

72. In those circumstances, I propose that the Court should reply as follows to the question referred for a preliminary ruling by the Supreme Court:

European Union law does not preclude a Member State from requiring by its legislation that a child's father who is not married to the child's mother must – in order to establish for the purposes of Article 2(11) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 that there has been a breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention – obtain from the court with jurisdiction a judgment awarding custody of that child to him in such a way that he qualifies as having 'rights of custody' within the meaning of Article 2(11) of that regulation.